No. 83-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit's interpretation of "willfulness" under the Age Discrimination in Employment Act (ADEA) is consistent with that of the other Circuits, and whether the undisputed facts justified its finding a willful ADEA violation.

2. Whether this Court should decline to consider a union liability issue raised by an employer for the first time in this Court, where the aggrieved employees do not seek review at this time.

3. Whether an employer that accommodates all younger employees disqualified from their positions for any reason but refuses to similarly accommodate employees at age sixty has violated the Age Discrimination in Employment Act.

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BRIEF FOR RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL IN OPPOSITION

Respondents Harold H. Thurston, Christopher J. Clark, and C.A. Parkhill (the *Thurston* respondents) respectfully pray that the Petition for a Writ of Certiorari of Trans World Airlines, Inc. (TWA) be denied.

COUNTERSTATEMENT OF THE CASE

Prior to 1978, TWA did not employ flight deck crewmembers over age sixty. The provisions of the TWA pilot retirement benefit plan set a crewmember's sixtieth birthday as his "normal retirement date" (A-8, A-32).[1] As amended on April 6, 1978, the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA) prohibits employers from requiring retirement before age seventy under the terms of an employee benefit plan. 29 U.S.C. §623(f)(2); A-7. Following the amendments, TWA determined that it was obligated to employ flight deck crewmembers as flight engineers[2] beyond age sixty (A-4; P.5-6). TWA and the Air Line Pilots Association, International (ALPA), the collective bargaining agent for crewmembers employed by TWA, failed to agree on revisions to the retirement plan (A-9). On August 10, 1978, TWA issued a bulletin authorizing the employment of "any cockpit crewmember who is in a flight engineer status at age 60," retroactive to April 6, 1978 (A-9).[3] The bulletin did not

[1] The following abbreviations are used in this brief: "A-____" refers to the Appendix to TWA's Petition for a Writ of Certiorari; "P.____" refers to TWA's Petition for a Writ of Certiorari; "J.A.____" refers to the Joint Appendix filed in the Court of Appeals.

[2] A Federal Aviation Administration regulation, 14 C.F.R. §121.383(c) (the Age 60 Rule), prohibits crewmembers from serving as Captains (pilots-in-command), First Officers (co-pilots), or International Relief Officers (IRO's) in TWA's commercial operations after age sixty. The Age 60 Rule does not apply to the flight engineer position (A-7); *see Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 546 (9th Cir. 1983); *Monroe v. United Air Lines, Inc.*, 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981).

[3] ALPA opposed TWA's action and filed its lawsuit the same day the bulletin was issued (A-32; P.6).

define "flight engineer status," nor did it advise crewmembers approaching sixty how they could obtain that status (A-9).[4] Under the terms of this policy, Captains and First Officers were required to bid on and be awarded flight engineer vacancies with "effective dates" prior to their sixtieth birthdays. Those who failed to do so were mandatorily retired and their names were removed from the seniority list at sixty (A-9 to A-10).[5]

TWA, at ALPA's encouragement, subsequently imposed two additional restrictions on downbidding Captains (A-11, A-32 to A-33). One rule required successful Captain downbidders to "fulfill their bids in a timely manner" (A-11). Initially, Captains who bid successfully for flight engineer vacancies were allowed to fly as Captains until age 60 and were later scheduled for flight engineer training. Under later practice, however, Captains who had been

[4] TWA thereafter reinstated only those crewmembers who it considered to have been in flight engineer "status" at the time of sixtieth birthdays occurring after April 6, 1978 (A-9). Respondent Thurston, who was forced to retire from his Captain position on June 11, 1978 despite his request to remain employed, was not recalled (A-10; J.A. 909-10, 647).

[5] Respondent Parkhill filed a bid for a flight engineer vacancy with an effective date of September 1, 1978. TWA refused to honor his bid because the effective date fell ten days after his sixtieth birthday. (J.A. 916-18).

Respondent Clark was retired on his sixtieth birthday, September 19, 1978. He wrote to TWA in July 1978 requesting continued employment after 60 (J.A. 929). On August 3, TWA responded that, for the time being, Clark's request would be denied. The letter went on to state that "should our policies ultimately be such that they would have permitted you to continue to work after attaining age sixty, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty" (J.A. 648). Despite this explicit promise, upon which Clark relied (J.A. 919, 922-24), TWA did not employ him after his sixtieth birthday.

awarded flight engineer bids were required to complete training and begin working as flight engineers before reaching age sixty (A-11).[6] Similarly, TWA previously placed successful downbidders on off-duty-without-pay status after their sixtieth birthdays until they passed the written examination required by the FAA for entry into flight engineer training. As of January 1980, however, TWA permanently cancelled the bids of Captains who could not prove that they had passed the flight engineer examination when reporting for training (A-12).

These severe restrictions on sixty-year-old TWA crewmembers contrast sharply with the airline's treatment of younger crewmembers who are disqualified from their positions for any reason. The TWA-ALPA collective bargaining agreement permits these crewmembers to retain their employment and to transfer without bidding, vacancies, or interrupting their employee status. The Second Circuit found that

> those who are unable to maintain a first class medical certificate but are still medically qualified to become flight engineers may automatically displace or "bump" a less senior flight engineer without being required to bid for the downgraded position. If the captain or first officer lacks sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years.
>
> Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reductions in force may use his seniority to displace a less senior pilot in any status at his current or last former domicile, or in his current status anywhere in TWA's system.[7] Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall.[8]
>
> In addition, TWA, as a disciplinary measure in response to demonstrated incompetence, has not discharged incompetent pilots but has permanently transferred them to lower positions (such as that of flight engineer) for which they are qualified, without requiring the pilot to bid for a vacancy. This practice apparently routinely occurs without contractual provision.

(A-10 to A-11). Moreover, a pilot who fails training for upgrading from flight engineer to First Officer or from First Officer to Captain is assigned permanently to flight engineer status at his domicile (J.A. 250, 265-66). This occurs regardless of whether or not a flight engineer vacancy exists there at that time (J.A. 930, 941-45).

The Second Circuit relied on this explicitly age-based differential in treatment in finding for the *Thurston* respondents. After reciting the now-familiar *prima facie* case formula first enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the court held:

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[6] This practice resulted in a loss of pay and responsibility during a period the crewmember could have been employed as a Captain (A-10; A-11 to A-12).

[7] A pilot who fails to submit a bid expressing his preference among these alternatives is automatically displaced to the next lower status his seniority permits, or to reserve status at his permanent domicile (J.A. 250, 311).

[8] TWA and ALPA have entered into a "furlough aversion" agreement reducing the hours worked by all pilots in order to avoid a furlough of crewmembers rendered surplus due to cutbacks in TWA's operations (J.A. 930, 939-40).

A plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age. *Stanojev* [*v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981)]; see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 & n.18 (1st Cir. 1979).

Plaintiffs in the present case took advantage of this alternative method of making out a prima facie case. Their evidence revealed that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, see *Geller v. Markham*, [635 F.2d 1027, 1031 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)] and establishes, therefore, a prima facie case of discriminatory treatment. See *Stanojev, supra*, 643 F.2d at 921; *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982).

(A-24, footnote omitted).[9] After reviewing TWA's and ALPA's asserted justifications, the court concluded that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim" (A-31, footnote omitted).

[9] TWA's suggestion to the contrary notwithstanding (P.12n), the result is in accord with this Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), which states that in a disparate treatment case, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335 n.15.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO MATERIAL CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD FOR DETERMINING "WILLFUL" VIOLATIONS OF THE ADEA.

The Second Circuit's determination that TWA willfully engaged in age discrimination represents no departure from established precedent. The court, following its earlier opinion in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981), held that in a disparate treatment case, "it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33). The Circuits, moreover, do not differ materially in their interpretation of "willfulness." To the extent that there is semantic variation, none of the formulas approved by the courts would lead to a different result here.[10]

TWA incorrectly argues that the Second Circuit's willfulness test is inconsistent with that adopted by the First and Seventh Circuits. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981).

The Seventh Circuit's opinion in *Syvock* is in accord with the result reached by the Second Circuit. The *Syvock*

[10] Although TWA asserts otherwise (P.9), the willfulness issue was briefed in the Court of Appeals. The *Thurston* respondents requested the Second Circuit to follow its precedent in *Goodman* (Brief for Plaintiffs-Appellants dated January 14, 1983, p. 29n.). TWA asked for a remand on the willfulness issue "in the unlikely event" that it became relevant (Brief for Defendant-Appellee dated February 7, 1983, p. 19n.).

court held that to prove willfulness, a plaintiff must show that "the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." 665 F.2d at 156.[11] Furthermore, the *Syvock* court stated that its willfulness test was consistent with the test endorsed by the Second Circuit in *Goodman*, and with the *Goodman* court's interpretation of *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980). *Syvock*, 665 F.2d at 155 n.9.

There also is no conflict between the Second Circuit's opinion and the decision of the First Circuit in *Loeb*, because the *Loeb* court did not specifically construe "willfulness" in the context of the ADEA. Rather, it was presented with the issue whether the "good faith" provision of the Portal-to-Portal Act, 29 U.S.C. §260, is incorporated into the ADEA. *Loeb*, 600 F.2d at 1020. *Loeb*'s passing mention of willfulness merely quotes a jury instruction treatise that does not specifically pertain to the ADEA. 600 F.2d at 1020 n.27. In fact, the quoted material refers to liability for criminal conduct. The standard for establishing willfulness, however, is less stringent in civil statutes such as the ADEA. *Wehr*, *supra*, 619 F.2d at 282; *see*

[11] The second aspect of the formula requires the plaintiff to show that (1) the employer knew or reasonably should have known the ADEA's requirements, and (2) the employer knew or reasonably should have known that his actions towards plaintiff were inconsistent with those requirements. The Seventh Circuit noted that the first part of this test will be easy to meet and that, as to the second, "the showing must be sufficient to indicate that the defendant's discrimination was not unconscious." 665 F.2d at 156 n.10. In other words, the action must be the result of a deliberate desire to remove older employees, rather than the unconscious application of stereotypes about older persons. 665 F.2d at 155. The *Thurston* respondents clearly have satisfied all of these requirements.

Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981). There simply is no conflict among the Circuits that would warrant this Court's intervention.[12] *See* Sup. Ct.R. 17.1(a).

Finally, the willfulness finding must be considered in light of the particular facts of this case, which are exceptionally strong. TWA admittedly reviewed its age sixty practices in response to the 1978 ADEA amendments and concluded that it was required to employ flight engineers over sixty (A-4, A-34; P.5-6). Despite this determination, the company proceeded to impose a series of restrictions designed to limit post-sixty employment to the greatest possible extent.[13] Thus, whatever definition of willfulness

[12] TWA suggests (P. 11) that the Third, Sixth, and Ninth Circuits have staked out yet a third position on the willfulness issue. The Sixth Circuit, however, has concurred in the reasoning of *Syvock*. *Blackwell v. Sun Electric Co.*, 696 F.2d 1176, 1184 n.12 (6th Cir. 1983). The *Syvock* court, in turn, agrees with the Third and Ninth Circuits. *See Orzel v. City of Wauwatosa*, 697 F.2d 743, 757 n.28 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) (*Syvock* expressed approval of *Kelly* and *Wehr*).

TWA also relies on two opinions from the Southern District of New York (P. 11n-12n). The Court of Appeals cited one of these decisions in its discussion of "willfulness" (A-33), and thus was aware of its existence. To the extent that these opinions depart from *Goodman*, they simply do not represent the law of the Second Circuit.

[13] TWA boasts of an 83% "success rate" among Captains seeking transfers at age 60 (P. 10n, 18n, 20). That figure, however, does not take into account the numerous pilots who decided not to seek flight engineer transfers because of the financial and other costs. *See* A-11 to A-12. Furthermore, as this Court has held in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, that statute "does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. . . . Every *individual* employee is protected against . . . discriminatory treatment. . . ." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982);

(Footnote continued on following page)

is applied to TWA's conduct, the ultimate conclusion will be the same. In view of the well-established principle that appellate courts should decline to review issues that are not necessary to the result, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 729 (8th Cir. 1964), certiorari should not be granted on this question.

II. THE ISSUE OF ALPA'S LIABILITY FOR BACK PAY IS NOT APPROPRIATE FOR CONSIDERATION AT THIS TIME.

The *Thurston* respondents agree with TWA that a labor organization found to have violated the ADEA should be held liable for back pay and other relief on the same terms as an employer. This issue, however, is appropriately raised by the individuals who have been aggrieved. The *Thurston* respondents will now receive full relief from TWA under the Court of Appeals decision.[14] As they have no need at this stage to have the issue litigated further, the Court should decline to grant TWA's Petition on this issue.[15]

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[13] *continued*
Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978). *See* A-25; *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (ADEA substantive provisions were derived *in haec verba* from Title VII).

[14] The *Thurston* respondents could have brought the action against TWA alone. *See Criswell*, *supra*, 709 F.2d at 557 (ALPA not a necessary party to age 60 action); *EEOC v. Eastern Air Lines, Inc.*, 26 Empl.Prac.Dec. [CCH] ¶32,122 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981) (union not indispensable party to ADEA action involving pension plan). Moreover, ADEA defendants are subject to joint and several liability. *Cf. Dunlop v. Beloit College*, 411 F.Supp. 398, 402 (W.D. Wis. 1976) (Equal Pay Act).

[15] In the event that the Court grants certiorari on this issue, the *Thurston* respondents reserve all rights with regard to their claim for monetary relief from ALPA. *See* J.A. 58, 62-66, 68.

Moreover, TWA has never sought, prior to filing its Petition in this Court, to have ALPA share liability for the actions that are the subject of this litigation.[16] TWA's attempt to shift the blame to ALPA for the first time in a Petition to this Court must be viewed as a vehicle for delay.[17] *Cf. Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (assertion not pleaded in the complaint and not considered by the District Court or Court of Appeals is not before this Court).

III. THE SECOND CIRCUIT'S DECISION IS FULLY IN ACCORD WITH OTHER DECISIONS INVOLVING DISCRIMINATORY TREATMENT BECAUSE OF AGE.

TWA's third issue is nothing more than a request that this Court re-evaluate uncontroverted direct evidence of discriminatory treatment because of age. The decision below represents no departure from established case law, and creates no new pitfalls for employers.

The court found that TWA permits downgrading by all pilots *except* those approaching sixty, "a differentiation based solely on age" (A-24).[18] The court also took note

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[16] ALPA filed a cross-claim against TWA in the *Thurston* action, alleging that the airline was solely responsible for the actions taken with regard to respondents. TWA, in response, merely denied ALPA's allegations. *See* J.A. 103, 105; 91.

[17] TWA, in effect, is seeking contribution from ALPA, a remedy to which it may not be entitled. *Cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91-92 (1981) (employer has no implied right of action for contribution from union for Equal Pay Act liability, as that statute was not enacted for employers' especial benefit).

[18] TWA's statement that it treated all crewmembers "equally" (P. 20) is flatly contrary to undisputed evidence that it imposed extra-contractual rules on sixty-year-olds alone (*see* A-9 to A-12; A-26).

of TWA's "conscious refusal" to relocate or retrain Captains and First Officers at sixty while doing so for all younger crewmembers (A-30).[19] The decision merely reaffirms the ADEA's mandate of equal treatment irrespective of age (A-29 to A-30); it does not grant preferential treatment to older workers merely because of their age.

The decision also is consistent with the "age as a determining factor" test that has been adopted by eleven Circuits. [20] Under this formulation, an ADEA plaintiff bears the burden of proving that age was a determining factor, *i.e.*, one that "made a difference" in the challenged employment decision. The *Thurston* respondents not only met, but exceeded that test. The Second Circuit found that age was not merely "a" factor, but was the *sole* reason for TWA's actions towards respondents (A-24, A-31). *Cf. Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983) (ADEA plaintiff is not required to prove that age was the exclusive reason for the employment decision).

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[19] As authority, the court cited *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), which TWA claims is contrary to the decision in this case (P. 19).

[20] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 896-97 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Carter v. Maloney Trucking & Storage, Inc.*, 631 F.2d 40, 42 (5th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550-51 (7th Cir. 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Anderson v. Savage Labs*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

The *Thurston* respondents do not claim any special "entitlement" or "new right" "simply because of age" (P. 18, 19). Instead, "they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing 'special' or 'preferential' about equal treatment" (A-29 to A-30).[21]

The Second Circuit's opinion follows from well-established ADEA principles and does not create any additional employee rights or employer burdens. The decision raises no new issues whatsoever, much less any that are worthy of this Court's consideration.[22]

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[21] TWA ultimately returns to the fallacious argument which formed the basis of its position below (P. 20n). The fact that crewmembers cannot "serve" as Captains after sixty, *see* 14 C.F.R. §121.383(c), does not mandate their severance from the seniority list. The Second Circuit saw through this smokescreen (A-25 to A-26), as have the other courts that have considered this issue. *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982); *Johnson v. American Airlines, Inc.*, 31 Empl.Prac.Dec. [CCH] ¶33,417 (N.D. Tex. 1983); *Monroe v. United Air Lines, Inc.*, 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981).

[22] As of this time, there is simply no need for the Court to examine the industrywide age sixty flight engineer controversy (*see* P. 17n). The only other appellate decision rendered in this issue is totally consistent with that of the Second Circuit, *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *rehearing denied*, December 20, 1983, and appeals are pending in two other cases. *Monroe v. United Air Lines, Inc.*, Nos. 83-1245 *et al.* (7th Cir.) and *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir.). Six air carriers have entered into consent decrees on this issue.

TWA's desire to have this Court establish guidelines for the airline industry (P. 18n) is somewhat ironic since in 1979, TWA vigorously (and successfully) opposed plaintiffs' efforts to consolidate twelve ADEA Age 60 cases for pretrial proceedings on the basis that factual issues and defenses were different for each airline. *See In re Airline "Age of Employee" Employment Practices Litigation*, 483 F.Supp. 814 (J.P.M.D.L. 1980).

CONCLUSION

For the foregoing reasons, the *Thurston* respondents respectfully request that certiorari be denied.

Respectfully submitted,

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